

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

<b>ANILE PHARMACY, INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Misc. No. 99-197 (TFH)</b>
	)	
<b>HOFFMAN-LAROCHE, INC., <u>et al.</u>,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM OPINION**

Pending before the Court is plaintiff Anile Pharmacy, Inc.’s motion to remand this case to the Circuit Court of Hancock County. Upon careful consideration of plaintiff’s motion, defendants’ joint memorandum in opposition to plaintiff’s motion, and plaintiff’s reply memorandum, the Court will grant plaintiff’s motion to remand.

**Background**

The instant class action, alleging violations of the West Virginia Antitrust Act, W. Va. Code § 47-18-1, et seq., and the antitrust statutes of Arizona, California, Kansas, Maine, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, North Dakota, South Dakota, Wisconsin, and the District of Columbia, was commenced by plaintiff on behalf of a class of indirect purchasers of Vitamins on or about June 23, 1999 in the Circuit Court of Hancock County, West Virginia. On July 28, 1999, defendants removed this case to the United States District Court for the Northern District of West Virginia, alleging diversity jurisdiction pursuant to 28, U.S.C. § 1332. Thereafter, plaintiff filed a Notice of Potential Tag-Along Action with the Judicial Panel on Multidistrict Litigation regarding the “Vitamins Antitrust Litigation” already pending before this Court. A conditional transfer order was issued by the

Panel on August 18, 1999. Plaintiff filed its motion to remand in the United States District Court for the Northern District of West Virginia on August 26, 1999. The case was transferred by the Panel to this Court before a decision was made on plaintiff's motion to remand.

### **Standard of Review**

Federal courts are courts of limited jurisdiction. Burns v. Windsor, Ins. Co., 31 F.3d 1092, 1096 (11<sup>th</sup> Cir. 1994); see also St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938). A federal district court may assert its jurisdiction, however, when citizens of different states are involved and the amount in controversy exceeds \$75,000<sup>1</sup>, exclusive of interest and costs. 28 U.S.C. § 1332(a). Therefore, when the parties are diverse and the amount in controversy is sufficient, a defendant has a statutory right to remove an action from state court and avail itself of the federal court system. 28 U.S.C. § 1441(a); see also Burns, 31 F.3d at 1095.

In cases such as this one, where a plaintiff has specifically claimed less than the jurisdictional amount in state court, a removing defendant must prove to a "legal certainty" that the plaintiff would not recover less than \$75,000 if it prevailed. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356 (11<sup>th</sup> Cir. 1996). Because removal jurisdiction raises significant federalism concerns, the removal statutes must be strictly construed. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941). All doubts about federal court jurisdiction must be resolved in favor of a remand to state court. Burns, 31 F.3d at 1095 (holding that "where plaintiff and defendant clash about jurisdiction, uncertainties are

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<sup>1</sup> The jurisdictional amount provision in 28 U.S.C. § 1332 has been changed from \$50,000 to \$75,000 under the Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996).

resolved in favor of remand.”).

## **Discussion**

Plaintiff contends that remand is proper because (1) the claim of the named plaintiff does not exceed \$75,000, including treble damages and (2) statutory attorneys’ fees have been waived and therefore cannot be added to the damage claim. Defendants claim that plaintiff’s statement that its damages will not exceed the jurisdictional amount is not controlling, that the matter in controversy will exceed \$75,000, and that this Court may exercise supplemental jurisdiction over the claims of absent class members under 28 U.S.C. § 1367. For the reasons discussed below, this Court finds that plaintiff is entitled to have this case remanded to the West Virginia state court.

### **I. The Court will Consider Plaintiff’s Waiver of its Statutory Attorneys’ Fees**

Generally, in determining whether the requisite jurisdictional amount is in controversy, the “sum claimed by the Plaintiff controls if the claim is apparently made in good faith.” St. Paul Mercury Indem. Co., 303 U.S. at 288-89 (1938). In circumstances where the plaintiffs have not placed an exact dollar amount upon their claim, “the court may consider, in addition to plaintiffs’ Complaint, the removal petition and other relevant matters in the file.” Adkins v. Gibson, 906 F.Supp. 345, 347 (S.D. W.Va. 1995).

Defendants argue that the affidavit filed by plaintiff’s counsel with his motion to remand, in which he waives his right to statutory attorneys’ fees, cannot be considered by this Court since it was not filed with the original complaint. See Aguilar v. Boing Company, 47 F.3d 1404, 1412 (5<sup>th</sup> Cir. 1995) (to foreclose removal, binding stipulation or affidavit limiting recovery to below jurisdictional

amount must accompany complaint; once a defendant has removed, later filings are irrelevant); In re Shell Oil Co., 970 F.2d 355 (5<sup>th</sup> Cir. 1995) (“Litigants who want to prevent removal must file a binding stipulation of affidavit with their complaints” because “the factual allegations of the complaint, not the empty words setting an illusory cap on damages, inform the jurisdictional inquiry.”). However, in these cases the court was convinced that plaintiffs were acting in bad faith. In this case, there is no evidence before the Court to show that plaintiff has acted in bad faith. Moreover, in both cases cited by defendants, the court found that it was “facially apparent” that the damages sought by each plaintiff exceeded the amount in controversy requirement. Aguilar, 47 F.3d at 1407; In re Shell Oil Co., 970 F.Supp. at 356. In this case, defendants have not provided the Court with facts sufficient to support such a finding.

Recently, courts have held that post-complaint affidavits can be considered where the jurisdictional question is ambiguous. See Asociacion Nacional de Pescadores v. Dow Quimica de Columbia S.A., 988 F.2d 559 (5<sup>th</sup> Cir. 1993), cert denied, 510 U.S. 1041 (1994) (post-removal affidavits may be considered where the jurisdictional question is ambiguous); Aguilar, 47 F.3d at 1407 (recognizing the validity of the Fifth Circuit’s holding in Asociacion Nacional and distinguishing Aguilar from Asociacion Nacional by the fact that, even if the district court had considered the affidavits in Aguilar to be relevant, remand in Aguilar was improper because it was facially apparent that the damages exceeded the jurisdictional threshold); see also Walsh v. J.B. Hunt Transport, Inc., 20 F.Supp.2d 1300 (E.D. Mo. 1998) (holding that sworn affidavit of plaintiff’s counsel filed with motion to remand case to state court, stating that plaintiff would seek total damages of no more than jurisdictional amount, was binding on plaintiff in any court and required remand); Adkins v. Gibson, 906 F.Supp.at

348 (granting plaintiff's motion to remand and holding that amount in controversy was established to a legal certainty to be less than jurisdictional amount because plaintiff made binding representations to Court as to amount in controversy and he could be held accountable under Rule 11 for his representation); Oder v. Buckeye State Mt. Ins., 817 F.Supp. 1413, 1414 (S.D. Ind. 1992) (supplemental pleading containing plaintiffs' certification that they did not seek recovery in excess of \$50,000 deprived federal court of subject matter jurisdiction); McCool v. State Farm Fire & Cas. Co., No. 4:98CV71-B-B, 1998 WL 527280 (N.D. Miss. July 20, 1998) (on motion to remand affidavit or stipulation filed by plaintiff's counsel regarding the amount in controversy may be considered to clarify complaint).

Since plaintiff has elected to limit its claim to an amount less than \$75,000, including treble damages, and since plaintiff's request for attorneys' fees in its prayer for relief could be viewed as ambiguous in light of the common fund doctrine, the Court will consider plaintiff attorney's affidavit as a clarification of the complaint. See In re Amino Acid Lysine Antitrust Litig., 918 F.Supp. 1181, 1187 (N.D. Ill. 1996) (antitrust class action in which court held that remand was proper where request for reasonable attorneys' fees in prayer for relief was ambiguous and where plaintiff's counsel subsequently made it "crystal clear" that the fees were sought under the common fund doctrine and not pursuant to statute). Therefore, plaintiff will be deemed to have waived its right to statutory attorneys' fees.

## **II. Defendants Have Not Met Their Burden of Proof**

Defendants have offered no specific facts from which this Court could conclude to a legal

certainty that plaintiff would not recover less than \$75,000.00 if it prevailed.<sup>2</sup> Instead, defendants rely almost exclusively on the argument that plaintiff has not waived its right to statutory attorneys' fees and that these fees would bring the claim over the jurisdictional threshold. However, as explained above, the Court finds that plaintiff has waived its right to statutory attorneys' fees. Attorneys' fees sought under the common fund doctrine, as opposed to statutory attorneys' fees, are not considered in determining the amount in controversy:

Unlike an attorneys' fee awarded to a party and payable by the other party under a fee-shifting statute or contract provision, a fee taken from the common-fund of the class recovery is not a separate and distinct form of relief comparable to punitive or compensatory damages, or even an injunction. Once the common fund of the class recovery is established from compensatory and, perhaps, punitive damages, class counsel's fee is deducted from it. It is the plaintiff class, not the defendant, that pays the common-fund attorneys' fee. Because the defendant does not pay the fee, it is not a part of the "controversy" between the parties. . . . Common fund attorney's fees are thus irrelevant [in] determining amount in controversy, because they are not paid by adverse party.

Campbell v. General Motors Corp., 19 F.Supp.2d 1260, 1269 (N.D. Ala. 1998) (citing In re Citric Acid Antitrust Litig., No. C-95-4578, 1996 WL 116827, at \*4 (N.D. Cal. March. 12, 1996)).

Therefore, since plaintiff has waived statutory attorneys' fees and has made binding representations that attorneys' fees will be limited to those recoverable under the common-fund doctrine, the Court cannot

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<sup>2</sup> Defendants claim that they must only prove facts supporting federal jurisdiction by a preponderance of the evidence. This Court disagrees. Where a plaintiff has specifically claimed less than the jurisdictional amount in state court, a defendant must prove facts supporting federal jurisdiction to a "legal certainty." Burns, 31 F.3d at 1095; Tapscott, 77 F.3d at 1356. However, the Court notes for the record that defendants have not satisfied even the lower preponderance standard in this case.

consider attorneys' fees in determining the amount in controversy in this case.

The complaint expressly alleges that plaintiff's claim does not exceed \$75,000.00, including treble damages. See Complaint at ¶ 2. Where a complaint places an upper limit on its request for damages, the district court should not make an independent appraisal of the claim. Angus v. Shiley, Inc., 989 F.2d 142, 146 (3d Cir. 1993). Defendants argue that removal would be improper in this case because in West Virginia a plaintiff is not bound by the sum requested in the complaint and may seek to amend it after final judgment to conform to the evidence. However, in an analogous case, a federal court allowed remand, despite the flexibility of West Virginia law, because the plaintiff had made a binding representation to the Court that the amount in controversy was less than the jurisdictional minimum. Adkins, 906 F.Supp. at 348. Since plaintiff is "accountable under Rule 11 of the Federal Rules of Civil Procedure, the Local Rules of this Court, and the Rules of Professional Conduct," for its representations, the Adkins court reasoned, it is permissible to rely upon plaintiff's representations. Id.

Since defendants have provided this Court with no specific facts which would prove that the amount in controversy in this case will exceed \$75,000 and since plaintiff has an "absolute right" to circumscribe their litigation to avoid federal jurisdiction, as long as it is not acting in bad faith<sup>3</sup>, the Court finds that remand is proper in this case.

### **Conclusion**

For the foregoing reasons, this Court will grant plaintiff Anile Pharmacy, Inc.'s motion to remand this case to the Circuit Court of Hancock County. An order will accompany this opinion.

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<sup>3</sup> See In re Amino Acid Lysine Antitrust Litig., 918 F.Supp. 1181, 1189 (N.D. Ill. 1996) (citing St. Paul Mercury Indem. Co., 303 U.S. 283)).

January\_\_\_\_, 2000

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Thomas F. Hogan  
United States District Judge